UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THOMAS E. PEREZ,

Plaintiff,

vs.

A.C.E. RESTAURANT GROUP, INC., et al.,

Defendants.

CIVIL ACTION
NO. 15-cv-07149

MOTION TO DISMISS

UNITED STATES COURTHOUSE
ONE JOHN F. GERRY PLAZA
4TH AND COOPER STREETS
CAMDEN, NEW JERSEY 08101
SEPTEMBER 27, 2016

B E F O R E: **THE HONORABLE JOSEPH H. RODRIGUEZ**
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
BY: LINDSEY ANN ROTHFEDER, ESQUIRE
DANIEL M. HENNEFELD, ESQUIRE
DUSTIN M. SALDARRIAGA, ESQUIRE
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and
STOKES WAGNER, ALC
BY: ARCH STOKES, ESQUIRE
JOHN HUNT, ESQUIRE
Counsel for Defendants

Certified as true and correct as required by Title 28, U.S.C., Section 753.

/S/ Karen Friedlander, CRR, RMR

THE DEPUTY CLERK: All rise.
(OPEN COURT, September 27, 2016, 11:11 a.m.)
THE COURT: You may be seated.
MR. STOKES: Good morning.
THE COURT: Counsel, we're now on the record in the matter of Thomas E. Perez against the A.C.E. Restaurant Corp. and others under our Civil No. 15-07149 for the purpose of hearing a motion to dismiss the First Amended Complaint filed by the defendants under our Docket No. 15.
May we have the appearances for the record.
MR. STOKES: Your Honor, Arch Stokes for the defendants, along with two co-counsel, who will introduce themselves.
MR. WEINER: Good morning, Your Honor. My name is Douglas Weiner appearing on behalf of all defendants in the action.
MR. HUNT: John Hunt, Your Honor, on behalf of all the defendants.
MS. ROTHFEDER: Good morning, Your Honor, my name is Lindsey Rothfeder. I'm appearing on behalf of the Secretary.
MR. SALDARRIAGA: Good morning, Your Honor, my name is Dustin Saldarriaga on behalf of the Secretary.
MR. HENNEFELD: Good morning, Daniel Hennefeld also on behalf of the Secretary of Labor.
THE COURT: Thank you. Who will speak first for the

-- on behalf of the motion?

MR. STOKES: May it please the Court, Your Honor, my name is Arch Stokes and if I may speak first for the defendants and my co-counsel Douglas Weiner will also address some of the issues in this case, if that's permitted by Your Honor.

THE COURT: Yes.

MR. STOKES: May I approach the lectern, Your Honor?

THE COURT: Yes, you may.

MR. STOKES: Thank you, Your Honor, and is it all right if I use my iPhone for my notes? I take my notes on my iPhone.

THE COURT: Just --

MR. STOKES: I mean, I'm 70 years old, but I'm trying to catch up.

THE COURT: No, we had someone do that yesterday and they inadvertently got to the Eagles score.

(Laughter.)

MR. WEINER: It's a good score, wasn't it, Your Honor?

THE COURT: Yes, you may.

MR. STOKES: Thank you.

THE COURT: Whatever makes you comfortable.

MR. STOKES: Thank you very much, Your Honor.

Your Honor, the defendants move to dismiss the

Complaint because it fails the well-pleaded Complaint standards set in Twombly and Iqbal and a host of other cases. The defendants, as Your Honor knows, are being accused of a host of Fair Labor Standards Act of 1938 as amended violations. And they're accused of violating various aspects of the Fair Labor Standards Act among their restaurants.

The defendants, many of whom who are here in this courtroom today, Your Honor, are restauranteurs that have family-owned business in the State of New Jersey that have been running restaurants in this state for some time. They also have a couple of restaurants in New York, in Long Island that are also accused of wage and hour violations.

The difficulty with the Complaint that we have found is that it randomly and selectively picks out a few what may be mistakes or what maybe compliance issues, and applies those mistakes in a broad way throughout the entire number of 17 restaurants that the defendants run.

If I may, Your Honor, if I may approach the bench, I have furnished copies of this to opposing counsel. I have a chart of New Jersey and Long Island that summarizes the allegations as they apply to each of the 17 restaurants. It's the only way I could keep track of it.

If I may approach, Your Honor.

THE COURT: Yes, you may. All right. Thank you.

MR. STOKES: So when we received the Complaint and the first amended Complaint and we tried to match the allegations with the restaurants, it turned out that some of the restaurants that are run by the defendants were not even specified in the Complaint. There are four, for example, where there's no allegation of any specific wage and hour violation, except for the general catchall that there are record keeping violations among all of them. Those four are Bayonne, Bridgewater, New Brunswick and Woodbridge. We would state for the Court that it appears that the Department of Labor has not fulfilled its standard of pleading with specificity a well-pleaded Complaint from which reasonable inferences may be drawn for the violations in those four.

Now, the most important allegation that the Department of Labor has made is that a tip credit has been taken to discharge an employer's responsibility to pay the minimum wage, when it should not have been taken, and they allege, for example, that a category of employee called expediter, which is kind of like a runner or in some more upscale restaurants, it could be a front waiter and a back waiter category. So they have servers and expediters. The expediters actually bring the food to the table of the restaurants involved.

The brand that's involved here are Houlihan's restaurants located in these 17 locations. And so the Department of Labor argues that because there was a tip pool that shared a portion of the server tips, with the expediter, that that invalidated the entire tipping arrangement.

The trouble with the allegation is, it doesn't state with specificity the representative number of violations.

The only thing that a reasonable reading of the Complaint causes one to conclude is that there may be an error here or an error there for one workweek or for one employee at one restaurant and not another restaurant.

And so, for example, the Department of Labor has failed to say this policy is represented in 17 different restaurants and here's the evidence from which we can prove that. They don't plead that, and they've had two years to investigate the matter. The Wage and Hour Division of the Department of Labor asked for information, asked for electronic recordkeeping of all the hours and the schedules and the pay of all of the employees which total about 1,430 among these 17 restaurants, Your Honor. They asked for that information. This employer -- these gentleman in the back freely cooperated with all their requests. They weren't -- there wasn't any dispute about that. They weren't obstreperous, they weren't recalcitrant. They gave them everything for two years.

Then after that two years of investigation and during that time, the Department of Labor also learned that the New Jersey Department of Labor had conducted its own examination of their tipping program and there are other violations that they now allege and the New Jersey Department of Labor found they were in compliance with the law that was similar to the Fair Labor Standards Act.

The Department of Labor knowing all that and having all that material, Your Honor, still files a Complaint that says in this workweek, this particular individual wasn't paid, according to the law, and picks out a few examples.

Now, forgive me, Your Honor, but I'd like to state for the record a few fundamental points that have frustrated us in defending this. The first is that everyone knows that all Fair Labor Standards Act compliance issue are workweek-by-workweek and individual-by-individual issues. That is, you can be in compliance or out of compliance from workweek to workweek, from employee to employee. So when the Department of Labor says here's an example of a violation because an individual wasn't paid this way or that way, that one violation can be an aberration or it could be a practice. They don't plead with specificity according to the representative pleading standard of Twombly and Iqbal and a host of other cases that gives us the opportunity to defend. And so, for example -- I'll give you a couple of examples, Your Honor.

They have said here that some of the employees had to do custodial work, so, therefore, they shouldn't be in a tip pool because they do not have the participation in the stream of service that our clients have created for the business model for their Houlihan's for the State of New Jersey and the restaurants that they have in Long Island. And so they said, well -- the department, says well, the custodial workers are just doing custodial work, therefore, they are not tipped employees within the meaning of the regulations, the interpretive regulations of the Department of Labor and the law. And yet they cite one employee one day at one restaurant in Fairfield, New Jersey. That's the representative pleading for that.

On another one, they say -- they plead custodial work and roll-up work makes an individual ineligible to participate in the tip pool, and the roll-up work is where they're rolling up the silverware. And they use one employee, one day in one restaurant in Ramsey, New Jersey. They also indicate, for example, that this employee did something wrong or was paid wrong on a particular day.

Well, the wage and hour law says, plead with specificity, plead a violation of a workweek for every workweek, because you may be in compliance and out of compliance from workweek to workweek, going back as long as the statute of limitations would allow.

They did not do that.

They didn't even plead one of the most fundamental things that solicitor's of labor have presented in the cases, and I've been doing this for 40 years or so, I've never seen a

Complaint that doesn't allege what the standard workweek is.

There's an allegation here that we didn't pay somebody overtime. Well, the Fair Labor Standards Act says, you have to pay time and a half the regular rate of pay. "Regular rate of pay" is a phrase -- phrase of legal art for all hours worked -- "hours worked" is a phrase of legal art -- for all hours worked within the standard workweek for all hours worked over 40 within the standard workweek.

So they've said, we had employees at one restaurant working at another restaurant that worked more than 40 hours and, therefore, they are in entitled to overtime. But you have to plead what the standard workweek is to know whether the 40 hours is -- whether you've been paid time-and-a-half, the regular rate of pay for all hours worked over 40, within the standard workweek. It isn't just over 40, it has to be within the standard workweek. They didn't plead that.

So they claim that we, therefore, violated the wage and hour law by aggregating employees working but without pleading. They've also indicated, Your Honor, that we have violated the wage and hour law by not posting a proper notice. The law says, if I may approach again, Your Honor, and I've furnished copies of this to opposing counsel. If I may.

THE COURT: Yes, you may.

MR. STOKES: The law requires that -- and this is the Department of Labor notice, that if you're taking a tip credit towards discharging your responsibility to pay the minimum wage for all hours worked within the standard workweek, you have to notify employees that you are doing that.

In order to have a violation of that, the plaintiff -- the Department of Labor should plead with specificity that we've checked all the restaurants and they don't have any notices. We would be in violation of the law if that were the case. If we did not post these notices, which we have in all of our restaurants, and they had two years to check this out. So what did they do? They interviewed someone from the defendant and they said, where are the notices and all that? And somebody from the defendant says, well, have you check the employee handbook? They looked in the employee handbook and they didn't see a reproduction of this notice in the employee handbook, so they said, generally, you must be in total violation of the notice requirements in order to take a tip credit to discharge your responsibility to pay the minimum wage under the Fair Labor Standards Act of 1938 as amended.

So, in fact, they should have pled. We have checked the restaurants. Here are the restaurants where they have the notice, here are the restaurants where they don't have the notice. They didn't do any of that.

So -- and why is this significant? In order for an employer to lawfully take a tip credit, there are several things an employer has to do. First of all, it has to be a tip and not a service charge or a commission or an automatic charge before the fact of the service. TIP is an acronym for To Insure Promptness. So it comes after the fact.

So the tip is supposed to be left after the fact and whether to tip, and if so, in what amount is determined at the customer's discretion.

The customer may leave that tip for whomever she or he desires. But that customer has to have the discretion to do that.

So No. 1, it's got to be a tip and not some automatic charge, like a service charge or a commission or a -- something added onto the price of the meal. There's no allegation and this is not the case here and these are the tips we are talking about.

No. 2, the employee receiving the tip from which we are taking a tip credit has to be a tipped employee, within the Department of Treasury regulations. Do you make $30 a month or more regularly and customarily in receipt of tips in the normal course of your job.

All of the expediters regularly and customarily made anywhere from 6, 7, 8, 9 dollars an hour in the sharing of the tips of the tip pool.

They made -- and the servers and the expediters made anywhere from 13 to 17, sometimes $19 an hour when you add their hourly rate with their tips. They had two years to investigate this. They could have pled whatever they wanted to plead in that regard. They assiduously avoided that because they knew that that was the case.

No. 3, the management is not supposed to be taking a portion of the tips. One of their allegations is that there were -- there were periods of time in which the tips varied and management made the tips -- evened out the tips from time to time. But there's no allegation and there's no proof anywhere in the motion to dismiss, no allegation, that management is actually taking tips and putting in their pockets.

They do make this allegation. They make the allegation that in order to keep your wages lower over here, they are taking from tips over there, so they don't have to pay as much over there. To that extent, they've made that allegation. But the fact of the matter is, the wage and hour law doesn't say that the tip credit is like an exemption from the overtime pay provisions. If you're dealing with professional executive outside sales, Section 7(i) commission employee exemption, those are exemptions from the requirement to pay the overtime pay provision.

The tip credit is just added -- is just a way of paying the minimum wage. It's a lawful way of paying the minimum wage that's existed for many years, and the regulations support that. Their own regulations support a tip pool as long as the people are within the stream of service.

They had two years to investigate whether expediters -- all you have to do is go to a Houlihan's and sit there. And this a common experience of anyone that's been a patron of a restaurant or anyone that's worked as a tipped employee -- and I started as a tipped employee when I was 14 at a pancake house for Bernardo Romero.

But the fact is that anybody that's been a tipped employee knows that all of these individuals know what the tips are and where they go. They argue about them, they want them. Everybody is -- knows that there are tips that are left and most of the people know that it's the lion's share of their income. So there's no doubt about any of that.

So management did not take any tips and put those tips in its pocket. There are wage and hour cases, there are tip credit cases. I've handled some where the management is accused of saying, give me a portion of those tips.

That's not the case in this situation. They may attempt to argue otherwise. It's not the case in the pleadings that they've pled thus far, do not make that allegation as efficaciously as they should if they're going to make that allegation.

So when you look at the allegations that they've made concerning the tip credit, they simply say that notice was not adequate. In fact, the notice was adequate. When you look at the allegations as to whether the tips have been taken from anybody, there's no, there's no specific allegation that management took that money and put it in its pocket to -- so that it could, it could make more profits.

The individual requirement for taking a tip credit also includes that, in fact, the customer has intended to leave the tip, and the customer did intend to leave the tip in this case, and so as far as we're concerned, the Complaint falls flat on the issue of whether the notice was adequate or whether the notice was consistent with the law and whether the tip credit was taken.

Now, let me invite the Court to consider before I turn it over the my co-counsel here, on the question of stream of service. These are restauranteurs. These gentleman have a product that they've sold in the State of New Jersey for many years. Their stream of service is how do I deliver this service to the patron. The expediter and the server work hand in glove. A video of that -- anyone that's been there and if they investigate it for two years, they would have seen that. Anyone knows that that expediter comes to the table. So what has the Department of Labor said in their pleadings? They have said, well, they do some custodial work. Their own regulations allow servers to do custodial work. They allow expediters and classifications called runners that are analogous to that to do custodial or other work, other than specifically coming in contact with the customer.

What the Department of Labor is attempting to do by this pleading is compel us to defend 1,430 employees, times the number of workweeks, times the number of allegations that they have randomly and selectively alleged here, close to a hundred to a hundred and fifty thousand mathematical possibilities of compliance has been alleged and they've said, because we have selected a few, that establishes the policy, that establishes the practice in all 17.

Now, Your Honor may be asking the question, well, what do you want me to do. The government is entitled from time to time to plead in a way that doesn't cover every single possibility under the sun. Of course that's the case. We know that. But in this case, if you read the Complaint, the Complaint specifically simply says, here's an example of this. And I would invite Your Honor to consider this chart that we put together. I did this just so I could understand it because it's so fleeting and so random.

The Lawrenceville restaurant is accused of excessive meal deductions. You're allowed to deduct for the cost of the meal so long as you don't profit from that. Their own regulations have allowed that for years.

Hasbrouck Heights, New Jersey, retention of tip pool funds and excessive meal deduction. Different. And they used an example that it covers, you know, just a couple of employees. They don't say 20 or 30 or 50.

Paramus, they say, retention of tip pool funds. In Brick, New Jersey, failure to notify of tip credit. Their sole evidence of the notice issue, their sole allegation of the evidence issue on the -- in their Complaint, in the First Amended Complaint, is someone told them that the notice was in the handbook and they looked at the handbook and they found a blank page.

Did they go into the back of the restaurant and look for where the notices are posted? Just probably in this building itself you can find notices of various laws posted for various employees. Did they do that or did they at least allege no notices have been posted.

This is what is required by law. This is what is required by the Department of Labor, and the Department of Labor's own regulations have approved this. The Department of Labor regulations don't say, if we post the notice, you must also prove that employees read it. They don't say, if you post a notice, that's not adequate, because it may not be in the proper language or whatever. They don't say that at all.

Department of Labor's regulations simply say, you have to post the notice. All 17 restaurants have it. They knew that at the time they filed this Complaint. Why did they assiduously in this Court have failed to plead that, is a little mystical to us.

They based this -- and by the way, if you don't comply with the notice requirement, your entire tip scheme is totally abrogated. And so it's a serious matter to say to the employer, you're taking a tip credit illegally because you don't have adequate notice. That's a mandatory requirement of taking a tip credit towards discharging the responsibility to pay the minimum wage.

Of course another requirement of taking the tip credit is you have to make enough tips so that if you're paying the minimum that the federal law requires, if the minimum wage is 7.25 an hour and the tip credit -- the tip amount is the difference between 2.13 an hour and 7.25 an hour, these individuals are paid a lot more than that per hour and they also make a lot more than that in tips. And the two years of investigations proved all that. They have all the records. And that's the reason they didn't allege in there, well, they didn't make enough tips to discharge the responsibility.

In Fairfield, NJ -- I mean, in Ramsey, New Jersey, it's custodial work and rolling work, and that's it. In Fairfield, New Jersey, they said, well, somebody did custodial work. And these are not 20, 30, 40 employees over a period of three years. This is like one, two employees.

The Cherry Hill, New Jersey, expediter allegations. Secaucus, expediter. And Secaucus and Weehawkin, they say that failure to aggregate hours at separate restaurants. So that involves two employees and two different restaurants. That's it.

These are aberrations if they are, indeed, factual.

You move on down to Eatontown and also Holmdel, it's off the clock. They say people have been working off the clock. Westbury, you can see the specifics there and then the bottom four, there's no allegation whatsoever.

So what are we asking Your Honor to do? We're asking Your Honor to look at the Complaint and, A, dismiss those portions of the Complaint that don't adequately plead what we're supposed to defend.

Secondly, we're asking Your Honor to require the government, if they're going to plead anything, they should plead it with specificity, and this is not their first attempt, this is their second attempt at doing this after two years of investigation.

So we're inviting the Court with great respect to look carefully at these allegations and we believe that more of them than not ought to be dismissed.

Last point I'll make is this. When you look at their anecdotal examples, Your Honor, those anecdotal examples, instead of proving that that's the general rule or practice, because the wage and hour law is written the way it's written for workweek by workweek violations and individual by individual violations and compliance issues. Because it's written like that, these anecdotal examples merely prove that there might have been some mistakes made. There might have been a mistake here and a mistake there, and so forth and so on. Sue us for that. Have that individual sue us.

The Rule 23 winnowing requirements to keep class actions a little bit more manageable is thrown out the window by this class. The 216(b) of the Fair Labor Standards Act in which you would have a certification process, you would have a final collective action hearing in which we determine who should be in and who should be out and for what allegation and for what period of time. The Department of Labor doesn't have to comply with that when they sue. They have one client. The solicitor of labor lawyers that I have a great respect for, the solicitor of labor lawyers have one client, the Department of Labor. They don't represent a single employee. If a private employee sues us, they have to plead with specificity. Why should the Department of Labor be allowed to just throw all this on the wall and say, well, these are the general rules and therefore, you've got to defend 1,430 individual possible compliance issues times the number of weeks, times the number of issues over a period of time. It will bankrupt our client to have to go through the discovery just for the way this plaintiff has pled this in this case. It will run them out of business. Even if we litigated the whole thing and we won 90 percent of the cases, they would be out of business at the end of the day by having to defend this.

The government should be required to tell us what we've done wrong wherever we've done something wrong. And by the way, not only has the defendant in this case said, okay, if you don't want this group included, we won't include that group, even though we steadfastly believe that an expediter should be included.

Everything the government has asked us to do, we have said, we will be happy to do it. Even though the State of New Jersey said, what we were doing is just fine in a similar wage and hour law. We still have been cooperative. This is not a recalcitrant employer. This is a family-owned restaurant business that tries its best to deliver a product, make a profit without taking advantage of any of the employees.

At this time, Your Honor, I would leave you with the final point, and that is, Rule 1 of the Federal Rules of Civil Procedure that was recently amended in December of 2015, that has to do with the scope and purpose of what these rules are all about. As Your Honor knows much better than I, and I apologize for inviting you with respect to consider this. It specifically says, not only should the Court be a gatekeeper and make sure that the litigation is speedy and efficient and inexpensive, but in the recent amendments, they said the parties also have to make sure that the litigation is speedy, efficient and inexpensive.

The way this is pled makes us feel like we're fighting a gossamer. We feel -- we feel like we're fighting clouds and shadowboxing with allegations that don't apply.

Sue us at this particular restaurant or sue us at that particular restaurant and we'll defend that. Find the specific allegations where you think that there's a violation of the law and that we've done something wrong. If we haven't complied to date, then sue us there, but don't do it with such a broad brush. And, Your Honor, I appreciate very much your tolerance and I would turn the matter much over to my much smarter and esteemed colleague Doug Weiner.

MR. WEINER: Thank you, Your Honor. Don't know about the much smarter aspect of the introduction. I think that my colleague Mr. Stokes has covered a good part of the motion that we filed. What I do have, Your Honor, is the 30 years of experience as a senior trial attorney for the United States Department of Labor. I worked in the very office that my esteemed colleagues are from. My time at the Department of Labor overlapped with Mr. Hennefeld's.

For a brief period of time I left the Department of Labor, the service of the Department of Labor about eight years ago and I have great respect for the work and the mission that the Department of Labor has; however, I also am fully familiar with the requirements of a pleading standard. I lived the cases that we cited in our motion papers. *Reich* is -- was the Secretary of Labor. He was my boss, Robert *Reich*, versus Gateway, set forth a fairly representative standard when the Secretary of Labor alleges a violation and intends to expand that instance, there must be a strong connection between the alleged violation of law and any violations alleged to have been represented by the example given.

In this case, Your Honor, that's what's specifically missing from the nine issues that the Secretary has alleged. When there's an allegation that an individual worked off the clock, there is no allegation that there was a common policy requiring work off the clock.

When you examine the payroll records of 1,430 individuals over a three-year period, you're going to find that there's an individual in one workweek who forgot to punch in and who may have forgotten to punch out, and it may be that a manager missed that failure to punch in and punch out. There's no allegation that that instance was a widespread practice or was an intentional policy of the restaurant group.

With regard to the fairly representative standard, the same argument of a lack of connection, a nexus between the aberrational examples given and the experience of employees at locations that are not identified in the Complaint, is widespread.

However, in addition, the allegation with regard to the expediter themselves, the occupation that the Department of Labor has said in this case, invalidates the tip pool because of their participation in it. The allegation is insufficient to state a cause of action because the standard unit of measurement in the Fair Labor Standards Act for all purposes is the workweek, for minimum wage, for overtime, for tip eligibility.

The Secretary of Labor's highest official, the administrator of wage and hour issues, interpretations, issues opinion letters. In 1997 the administrator of wage/hour issued an opinion letter that explicitly stated that tip eligibility of employees is determined on a workweek basis.

In this case, the only allegations that expediters are ineligible appears in an allegation that at Secaucus there were expediters who did not interact with customers for the entire duration of their shifts. An entire duration of a shift is a far smaller period of analysis of tip eligibility than the entire workweek.

The allegation of the Complaint conflicts with Department of Labor interpretation and application of the standards of the law.

In the next allegation of violation by the expediter at Cherry Hill, the allegation is equally deficient. The allegation of the Complaint states that during the majority of dinner shifts, some dinner shifts had not been what the

Department of Labor considers there to be a sufficient amount of direct customer interaction.

But by reasonable inference, the allegation is that other dinner shifts, there was sufficient customer interaction, and Houlihan's serves lunch, too. There's no allegation that the lunch shifts violated the tip eligibility standards of the act, and because the allegations that are made, even though they are not representative of any other locations, even at Secaucus and Cherry Hill, the allegations of violation of the expediters failed to meet the workweek standard and must, as a result, be dismissed.

Your Honor, I'll be delighted to answer any questions that the Court may have.

THE COURT: Well, first, let's hear from the government.

MR. WEINER: Thank you, Your Honor.

MS. ROTHFEDER: Good morning, Your Honor. Once again, my name is Lindsey Rothfeder. I'm here representing the Secretary. The Secretary of Labor's Complaint explains in detail the many ways in which defendants violated the Fair Labor Standards Act. Given the facts in the Complaint, it is not only plausible, but probable that defendants owe their employees unpaid wages under the Fair Labor Standards Act. Therefore, the Secretary's complaint meets and exceeds the pleading standard of plausibility established by the Supreme

Court in Iqbal, as well as the Third Circuit's guidance in controlling cases, such as *Davis v. Abington Memorial Hospital* and *UPMC Shadyside*.

Turning to defendant's argument regarding representative pleading. It is very important that Your Honor understand that defendants have made up this argument for representative pleading at the pleading stage out of whole cloth. There is no authority that supports such a representative pleading burden at this stage. The cases cited by defendants, *Reich*, among others, explicitly deal with cases that are at the trial level evidentiary stage, not the pleading stage. And, in fact, defendants are ignoring Third Circuit's guidance on this matter offered in *UPMC Shadyside* which explicitly states an evidentiary standard is not a proper measure of whether a Complaint fails to state its claim. Standards of pleading are not the same as standards of proof. Summary judgement standards and 12(b)(6) standards are vastly different.

Once again, I just feel it needs to be emphasized, this representative pleading concept, there is no authority for that, and it goes against established Second Circuit -- I'm sorry, Third Circuit law.

Turning also to the facts that are actually in the Complaint, I think defendants frequently ignored the facts that are actually in the Secretary's Complaint. For example, defendants stated repeatedly that the Secretary had failed to make a workweek pleading in regards to the Secretary's overtime allegations. That is inaccurate. If Your Honor turns to paragraph -- sorry -- 97, the Secretary states that defendants never paid overtime to employees who worked more than 40 hours in a given workweek by working at more than one restaurant in a week. That allegation is made up against all defendants as defined in paragraph 4 of the Secretary's Complaint.

Turning to defendant's point that somehow we should need to plead specifically against every restaurant, I think defendants are ignoring the extent to which the Secretary pled and defendants did not contest in this pleading -- in this motion that defendants are operating an enterprise. For example, the Secretary's Complaint details that all of the on-the-ground managers at every single one of these locations are employed directly by defendant's management group, A.C.E. Restaurant Group. We're talking about a single organization, albeit one that does have many different geographical locations.

Furthermore, I think in regards to our defendant's representative argument, I started to do the math while I was at home, and frankly, Your Honor, at home I had calculated that defendants would be requiring the Secretary to include 119 separate examples. I think having listened to them here today, I think that that is actually a very low estimate. I think the number the defendants appear to be demanding would be making a mockery of the Federal Rules called for a plain and short pleading.

I think they would also go against the Supreme Court's caution against excessive pleading requirements and against the Third Circuit's caution that, for example, we do not hold that a plaintiff must identify the exact dates and times that she worked overtime. That's from *Davis v. Abington Memorial Hospital*.

Turning for a moment to defendant's arguments regarding the withholding of tips and defendant's practice of not allowing employees to keep all of their tips, I think defendants again are arguing that the Secretary's pleadings have been insufficient, are ignoring the facts that are actually in the Secretary's Complaint.

The Secretary pleads at Paragraph 81 on Page 15 of the Complaint that across all locations defendants gave tips to employees working in non-tipped -- I'm sorry -- I was at the wrong -- defendants withhold employees -- sorry I gave you the wrong paragraph.

Paragraph 78, Page 14, the Secretary pleads explicitly that defendants withheld employees' tips. And the Secretary -- and this is in the Complaint -- says that defendants by May of 2014, defendants had amassed more than

$40,000 in tips withheld from employees across New Jersey and Long Island.

Again, there the Secretary is making these allegations on an enterprise-wide basis and is making those allegations very specific, like the 40,000-dollar number, I think, amounts to much more than the mistake that defendants would have you believe.

Defendants argued at great length that the Secretary did not plead explicitly that there were no posters at all of defendant's restaurants. I have a few things to say about this. First of all, the Secretary's pleading that defendants did not provide notice, as required under Section 203(m) of the Fair Labor Standards Act is in the Complaint. It's very difficult for the Secretary to prove that something did not occur or plead that something did not occur beyond simply stating plainly in the Complaint that such notice did not occur. The Secretary provided an example of the type of back and forth that we engaged in during the investigation to give Your Honor some idea of how we had come to that conclusion.

Very specifically, also, in terms of the poster and the posting requirement. As the Secretary briefed in the motion papers leading up to this argument, it is insufficient as a matter of law to provide notice to employees solely through a poster. There are several cases outlined in the Secretary's motion papers, as well as regulation that's been given broad deference by the Court that establishes that.

So defendants insistence that there should have been more attention given to the posters in the Complaint, I don't think that would get us very far, especially as the secretaries already explicitly pled, that no notice occurred.

There's a somewhat technical issue that I would like to respond to. Defendants appear to be arguing that because we did not plead explicitly as to some job categories, that violations occurred across -- that, for example, we pled that an expediter spent the entirety of his shift working in a non-tipped occupation, that that pleading is somehow insufficient.

Defendants have somewhat attempted to muddy the waters by talking about percentages in this case. This is not a case about percentages. This is not a case about how much time people spent performing tip duties versus non-tip duties. The allegations in the Secretary's Complaint are that the defendants included many, many employees of all different stripes; custodians, people who are doing exclusively roll-up work, and expediters who -- though this is a matter of disputed fact -- the Secretary would argue are not like runners, they are like cooks.

That those people somehow, that we need to be parsing their duties in a particular way. But the Secretary has elected those people are from wholly non-tipped occupations and, therefore, any time that they spend in their non-tipped occupations, whether it's an hour or a day or a shift, should be compensated at the non-tipped minimum wage. That is, in the regulations at 53156, and that's been held by -- upheld by several courts.

Does Your Honor have specific questions for the Secretary that I could answer?

THE COURT: No, I think if you would just -- if you have sufficiently addressed the arguments raised by the defendants and you're satisfied with that, we will see if the defendants now want to respond to anything you've said.

MR. WEINER: Thank you, Your Honor. It's most significant to note that the trial standard of evidence that the Secretary's counsel refers to deals with not a pleading standard, but about with a preponderance of credible evidence standard to establish after trial the existence or nonexistence of a disputed fact.

We -- the defendants in this case do not contend that the Secretary or any plaintiff needs to prove by a preponderance of evidence in the Complaint that violations have existed. Quite the contrary, Your Honor. The defendants contend that the Supreme Court in Iqbal and Twombly require a factual showing. Could be disputed. Many cases have held that even though the Court doesn't believe the likelihood of the existence of the pled facts, if a factual showing is made, that will satisfy the pleading standard.

In this case, the defendant's contention is that a factual showing of violation, even a disputed factual showing of violation has not been made. We're not trying to establish a new standard, we're trying to apply the existing standard as cited in our papers, as cited by our circuit court opinions, as followed from the Supreme Court's decisions. It's not that we're trying to make a new evidentiary standard for a Complaint, we're merely trying to hold the Department of Labor to the same standards that any litigant that comes to the Federal Court must observe, which are federal pleading standards. In this case, Secretary of Labor has decided that it does not need to comply with federal pleading standards. The defendants here ask Your Honor and this Court to hold that they do.

With regard to the enterprise theory, enterprise is really a concept involving coverage under the act, whether there's common ownership for a common business purpose. The annual dollar volumes of different corporations can be aggregated to see whether or not the over 500,000-dollar annual dollar volume requirement for federal coverage is met.

In the -- in this matter, the Secretary is conflating two concepts. One is the concept that there is a plausible allegation of violation in locations in which there's been no factual showing. When there's no factual showing, it's axiomatic that there cannot be a plausible allegation of violation.

Enterprise has to do with merely the coverage of the act itself.

With regard to a short, plain statement. There's been no short, plain statement with regard to violations of the tip pool at four establishments in their entirety. With regard to the invalidity of the expediters, there's been no short, plain statement of violation at 15 stores. There's been no short plain statement of violation at even the two stores that are alleged.

The effort by the Secretary in this case to parse an employee's duties who vacuums a rug before the restaurant opens, who wipes down a counter during service, who takes dirty dishes from tables and puts them in the back, from what they may describe as direct customer interaction of attempting to plead through the service directly with customers is -- it's an impossible standard.

As the case that we've cited that I have to note, Secretary's papers did not address, did not distinguish. Applebee's. *Roberts versus Applebee's*, describes this theory of allegation as being based on a flawed conclusion of law.

There aren't different occupations in the restaurant. Sometimes a server is performing custodial duties of vacuuming or polishing a table. That doesn't make that server a custodian. The parsing of duties, it's an impossible task, which is why the Secretary's counsel herself readily concedes that it's not about percentages. The amount of direct customer service necessary in order to sustain a valid tip pool has been deemed more than de minimus. It's not a percent. The cases that have held that the standard that allows the valid distribution of tips to workers who perform more than a de minimus amount of direct customer service provide that no violation of law has existed, that all of the employees who have received those tapes have received them validly.

With regard to the retention arguments, this is a particularly galling argument in that there is a very selective description of specific workweeks where the amount of tips collected in one workweek is demonstrated to be more than was distributed in that workweek.

However, the very same records that the Secretary's investigators have had -- and as Mr. Stokes says it's true and undisputed, over 18 boxes of payroll records were provided to the Secretary's investigators and employees were provided ex parte -- employee interviews were allowed. Every hourly employee at the restaurant, the Department of Labor's investigators had access to. Every manager via Department of Labor's investigators had access to.

The senior executives of the enterprise the Secretary's investigators had unfettered, unlimited access to. The named defendant in this case, Arnold Runstead provided an ex parte interview. He was interviewed by an investigator because he had nothing to hide. He had -- he had no intent to attempt to evade or mislead in any way. He had the knowledge that he had done the same thing over numerous occasions. In 2013 he provided unlimited access to the New Jersey State Department of Labor, and they conducted the investigation that they saw fit and reached a conclusion that there was no violation.

In 2014, NJ State Department of Labor came back to Houlihan's and the defendants did the exact same thing. You may look at any record you wish, you may interview any employee you wish, you may conduct any investigative method or technique you wish, and at the end of that, New Jersey again concluded, no violation.

Expediters were explicitly reviewed by the NJ State Department of Labor as reflected in the public records that we submitted with our motion papers. 2015, New Jersey's State Department of Labor returned to the Houlihan's enterprise and found again, complete and total compliance with the tip provisions, minimum wage provisions, notice provisions of New Jersey wage and hour law, which are identical to those provisions of federal law.

Under federal law the Secretary's regulations require the notice be posted. I think we've provided a copy of the notice. This is one that's well known to all the Department of Labor professionals and, yes, the Secretary has cited certain cases saying that if you post the notice that the Department of Labor requires you to post, that still doesn't satisfy the posting requirement. Well, that in itself was somewhat of a surprising contention, however, when you read those cases and look at the facts of the cases that the Secretary has cited, you see that notice is not considered appropriate if a poster is obscured, if a poster has been stained or vandalized or has been rendered illegible in some way.

In this case, the regulations require the posting of the notice. The Complaint makes no reference to a failure to post and the Complaint makes no reference to the fact or alleged fact that any of those notices were either obscured, illegible or otherwise not prominently displayed on employee bulletin boards where employees see their schedules.

And, Your Honor, it's also important to note that there's not a specific method of notice that needs to be provided by the statute. Posting the notice -- posting the published notice that the Department of Labor provides the regulated community, certainly is reasonably expected to satisfy that requirement. There's a case we cited, *Pellum*. Pellum says that it would be absurd to require the posting of a notice that doesn't satisfy the notice requirements of the act. That was the -- that was a Circuit Court opinion that reached that decision. It's hard to argue with that type of logic.

But beyond the notices that are posted at each restaurant, are the simple facts that, and I know that the Secretary's investigators have been provided with copies of employee's pay stubs. Every pay period, every employee receives a pay stub that sets forth the regular hourly rate they're paid on a direct basis, the amount of hours they worked and the amount of tips they received, for a total amount of compensation that they receive. Every individual employee is provided notice that their total compensation is a combination of the direct wage that's paid and the tips that they retain every single time they receive a pay stub.

That's in addition to the notice provisions -- or in addition to the poster that's on the wall.

And then we've heard some back and forth about a handbook. The employer has promulgated or updated handbooks true the years. 2013, which was the handbook that was in affect during the time period of the investigation, on Page 24, has clear reference to the tipping policies of the employer. Tips are the property of the employee who retains them. Tips are a percent, a portion of the total wage that you are paid, and apparently, there was some -- some printing error that took place nay subsequent edition of that handbook.

But between the poster, between the pay stubs and between the 2013 handbook that was in effect during the period of the investigation. We have written evidence that notice was provided, and that's before we get to the hiring process and to the orientation and training process that takes place orally over a two-week period, when people start to work.

Your Honor, in conclusion, unless the Court has questions, in this case, Secretary of Labor has proceeded on a course that appears to me, with 30 years of experience in prosecuting these matters, to be different from when I did as a prosecutor. It was the mission of the office that I served to identify the worst employers in the region and prosecute them.

My cases involved criminal enterprises, Mafia owned businesses, businesses that exploited for competitive advantage, the work of their employees. The employers who employed people off the books or coerced employees to lie to investigators. In this case, you see the opposite. I don't know why. In the eight years since I left the office, the solicitor's office has targeted an employer who, in every respect, has done what it can to provide more than fair place of employment, but a place of employment that people want to come to work, which is why they have employees who have consistently worked for years in these service positions and as my colleague, Mr. Stokes mentioned, if the complaint is allowed to stand as written, Your Honor, the defense of the matter may become so great that it would prevent those people from a source of income that they deserve, want and that should continue to exist for them and their families.

Thank you, Your Honor.

THE COURT: Before you leave, we haven't heard anything about the issue of preclusion.

MR. WEINER: Oh, Your Honor, thank you.

THE COURT: Are you pursuing that?

MR. WEINER: Yes, sir. Yes, sir. Yes, sir, indeed. And that is in 2013, 2013, 2014, 2015, an agency responsible for the enforcement of minimum wage and overtime investigated the defendant. That agency is not a pushover agency, Your Honor. New Jersey State Department of Labor has an aggressive record of enforcement. And in this case rather than finding millions of dollars due over a thousand employees, they found the contrary. So that the federal authorities and the state authorities have the same obligation, to enforce the same standards for the benefit of the same employees and to enforce those standards against the same employer. In this case, the state agency found one, two, three separate audits, separate years unfettered access to the employer's books, records and employees, no violation.

The fundamental purpose of preclusion in res judicata is to avoid the relitigation of the same issues.

THE COURT: Well, that's true, but it's strictly looking at preclusion, can you preclude a party who was -- even though there was a maybe a common purpose at the hearings, can you preclude a party who was not present or litigating that issue and not in privity with the State of New Jersey? Is there a separate entity, can you preclude them when they play no part in that hearing as a matter of preclusion?

You're saying, well, they had a common interest, but is the common interest sufficient to exclude them as a -- to bind them on this ruling whether they were not party to the litigation?

MR. WEINER: Your Honor, you ask a very good question, of course. And whether or not whether or not the technical application of the rules of preclusion are applicable here, I think that when it comes to a -- an allegation that is made in this Complaint that the defendants engaged in their practices in bad faith, that they did not engage in good faith, which is the basis of an liquidated damage allegation.

THE COURT: No, I'm aware of that but I'm just wondering whether strictly speaking everything you're saying may be very influential as a defense in the case itself, that other parties have reviewed these issues and have found them not to be worthy of charge. But can you preclude them from raising those issues because of what happened in the state when they were not a party.

Now, that's one thing. Let me see if I can understand and strip this down to where the judgments of this Court has to be made.

We're dealing with a motion to dismiss and the question as to whether something is plausible is if there's enough notice to the defendant, your entire argument is that when they filed this Complaint with some 17 parties, that they have to individualize each charge against each party. For instance, let's say they don't pay overtime, that they have to prove that with each individual defendant, they're saying, if I understand the arguments and where we have to be very careful as to how we rule on this, their argument is that if the defendants are, in essence, in the nature of an enterprise, that what they must do in their pleadings in a motion to dismiss is to point out the failures in doing so, picking one from each of these 17, although there weren't 17, I think the four were -- you say there were no allegations.

Saying, this is one of the violations and for the purpose of our Complaint, here's an example. This is the second allegation we made and here is an example. You're saying that that is insufficient because every time they say, here is a violation, they have to tie that violation to every one of the 17, right? And they're saying, we've given you sufficient notice as to the scope of what we're doing and we're not just guessing, here's this one, here's this one, here's this one.

Now, without ruling on which side is right, is that essentially where we are in this case?

MR. WEINER: Your Honor, I do believe that you have hit the nail on the head and I would only say to you, Your Honor, that a short and plain statement of violation cannot be that in this workweek, this individual, this store, there was a situation that took place, therefore, defendants, I'm going to flip the burden to you to prove that in every other workweek, in every other store, for every other employee, you gotta prove your innocence.

Your Honor, that's not what the Iqbal Twombly line of cases. That's not even what the previous line of cases starting with *Reich versus Gateway*, the DeSisto matter, the Southern Maryland.

If the Department of Labor brought a case on behalf of an individual and that individual, they made that allegation, then that is a plausible pleading. What's not plausible in this case, Your Honor, is that they have leaped from an example without an effort to demonstrate that it's an aberration or it's an example of a common policy and widespread practice.

THE COURT: All right. Now, just to make sure that we've separated what I believe to be the, in my words, the simple way I've tried to analyze the two parts.

MR. WEINER: Yes, sir.

THE COURT: All right. If it's sufficient in the notice issue, aren't we really then dealing on the individual basis that would be more appropriate in a motion for summary judgement. They have no evidence on this one, they have no evidence on this one. As opposed to saying, the way you've told us there were violations, they were all false. And they're saying, no, there are not; here's one here, here's one here.

We're saying, if you accept the general enterprise theory, notice-wise, you have the full scope of everything we want to say. May not apply to every single one, but it's the scope of the issue that we're raising enough to get by a motion to dismiss.

See, motions to dismiss are very delicately handled, enough to get by a motion to dismiss, not at all ruling on the legitimacy of the issue with respect to each one, and perhaps a motion for summary judgement can exactly do that. What do you have on Cherry Hill? What do you have on Secaucus? What do you have on -- they don't show it, out of the case; they don't show it, out of the case. I think there were four here where you're contending that even in the Complaint they're not alleging against them specifically. But will they survive if the notice of all of the other issues is sufficient to hold them in? Or, no, because there's not even a specific allegation on the last four.

They are the judgments we have to make using the motion to dismiss standard, which requires sufficient notice as to what you have to defend against. And if they're arguing, you're going to have to defend against excessive meal deductions, reductions in pool, retentions in pool funds. These are the issues you will have to defend against in, under our theory, that this enterprise-type issue. And you're saying, absolutely not, the pleadings phase of the case indicates you should specifically plead why there is excessive meal deduction offense in, say, Cherry Hill, when you only say expedited. That's basically your argument, is that it?

MR. WEINER: Your Honor, I want to address both parts of your question. Thank you.

One is our motion to dismiss is not taking the position that what has been alleged is false. We are prepared to concede for purposes of this motion, as we must, that the allegations are true. We would contest -- we do contest the veracity of these allegations, but, in this stage of the litigation, we contend that they haven't been made in a short and plain statement in a way that provides defendants with notice that the violations occurred outside the examples that were given.

THE COURT: Right. Now, if -- and I -- what I said, I don't mean false in a sense that -- I guess what I'm really saying is not accurate.

To try to pin excessive meal deductions on Cherry Hill when the only thing in the Complaint is expediter, right?

MR. WEINER: That's correct, Your Honor.

THE COURT: That would be a more specific pleading.

MR. WEINER: Yes, Your Honor.

THE COURT: But if what they're saying is these are the issues that we're raising and we're giving you an example which incorporates each of the defendants that we have identified here, would that be sufficient notice on a motion to dismiss as to the scope of their claim that can then be parceled out in a motion for summary judgement? Whether put to that proof of what is it that you have on Holmdel, and they would have to come forward with something -- well, they're saying off the clock, but not incorporate all the other violations.

I'm just speaking to show what to indicate the pursuit that we now have to make with respect to what we have, addressing a motion to dismiss, recognizing the arguments that are made, one, general like an enterprise, the other, individualized and how specific must it be and --

MR. WEINER: Your Honor, I recognize the significance of this issue. I recognize the significance of this case. I think that it could have not only a tremendous impact on the litigants, the defendants here, but it could also have affect on the way in which the Secretary pleads cases. I was with Solicitor's office when the Second Circuit said that the way you plead liquidated damages is inadequate to provide notice to the defendants. What you've got to do is X, Y, Z, and the Department of Labor's pleadings changed as a result.

I would encourage the Court to apply Rule 1, requiring the just, speedy, and inexpensive resolution of every litigated matter, and the primary objection to proceeding to summary judgement is that it would entail an expense in discovery that would potentially be crippling to this enterprise's survival and existence.

THE COURT: Counsel for the government have any last comment?

MS. ROTHFEDER: I think, Your Honor, I think that you are correct, that the Secretary's pleadings are sufficient to give Your Honor, defendants, and the public notice of the scope of our allegations. We very clearly made those allegations against the enterprise. Very clearly alleged the scope of that enterprise, including facts, such as the common control established by managers in each location being employed by the same company directly, and that those pleadings on their own are sufficient to meet the standards established by the Third Circuit and the Supreme Court, plausibility standard and the standards established by *UPMC Shadyside* and *Abington Memorial Hospital*, and that the illustrative examples that the Secretary provided to further clarify in everyone's mind exactly what we were talking about are merely the icing on the cake, really putting us over the top, in terms of exceeding the status standards established by the Supreme Court in the Third Circuit.

To call for more of those examples are truly -- I mean, I think we're talking about hundreds of examples at this point in time would, as I said before, make a mockery of the Federal Rule of Civil Procedures calling for a short and plain statement. Thank you, Your Honor.

THE COURT: Thank you, counsel, and thank you four your presence here today. As you can see, certainly it was critical for us to hear the advocates state their position as clearly as possible so that when we try to arrive at our decision, we're not only left with what the words were on the paper, but with the explanations that we've heard here, and I think each counsel has certainly represented your clients in an exemplary way, and it now simply causes us to have a few more sleepless nights as we arrive at a determination. So we will try to come up with an answer as quickly as we can.

MR. WEINER: Thank you, Your Honor.

MR. STOKES: Thank you, Your Honor.

(12:35 p.m.)

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